In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 972

ROBERT RAY SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

An indictment returned in the United States District Court for the Southern District of Indiana charged that petitioner procured an airline ticket for the transportation in interstate commerce of one Christina Marie Cox, for the purpose of prostitution, in violation of 18 U.S.C. 2421. After a jury trial, petitioner was found guilty and was sentenced to imprisonment for three years (Pet. App. B). On October 2, 1970 the court of appeals affirmed (Pet. App. A).

The facts appear in the opinion below. At trial Miss Cox testified that in December 1966, she went to work for petitioner as a prostitute at various places in Indiana, Illinois, Pennsylvania and Wisconsin and that, on or about February 6, 1967, petitioner purchased and gave her the airline ticket in question (from Indianapolis, Indiana to Chicago, Illinois) for the purpose of having her engage in prostitution at her destination. An FBI agent testified to petitioner's pretrial statements that he had never engaged in the business of prostitution, had never acted as an agent for a prostitute and had never taken a girl across a state line, except on one occasion. Over petitioner's objection, Wilma Nell Thomas was permitted to testify as a government witness that beginning in January 1965, she engaged in acts of prostitution for petitioner in Indiana and Ohio and gave her earnings to him. The trial judge admitted this evidence for the limited purpose of showing the criminal intent of petitioner in purchasing the airline ticket in question and instructed the jury to that effect immediately, and to like effect in his final charge.

Petitioner contends that the trial court erred prejudicially in admitting Miss Thomas' testimony. Evidence of other illegal conduct similar to that charged in the indictment is competent, however, to show intent and purpose. See *e.g.*, *United States* v. *Pape*, 144 F. 2d 778, 780-781 (C.A. 2), certiorari denied, 323 U.S. 752; *United States* v. *Eddington*, 328 F. 2d 760, 762 (C.A. 7), certiorari denied, 379 U.S. 818; *Lindsey* v. *United States*, 227 F. 2d 113,

117 (C.A. 5), certiorari denied, 350 U.S. 1008. As the court below further held (Pet. App. A3), Miss Thomas' testimony was also properly admissible to impeach petitioner's statements to the FBI that he had never been engaged in conduct proscribed by 18 U.S.C. 2421. *United States* v. *Acuff*, 410 F. 2d 463, 466 (C.A. 6), certiorari denied, 396 U.S. 830; cf. *Walder* v. *United States*, 347 U.S. 62.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1970.

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